United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

10

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,050

UNITED STATES OF AMERICA

V.

GREGORY L. BUTLER,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF ISSUES PRESENTED

In the opinion of Appellant, the following issues are presented:

1. Whether pretrial photographic and lineup identifications of a suspect made eight days after his arrest and during his detention were critical stages of the accusatorial process so as to entitle him under the sixth amendment to the assistance of counsel.
2. Whether the totality of circumstances of the photographic identification of Appellant, including absence of counsel, was presumably so unnecessarily suggestive and conducive to irreparable mistaken identification that Appellant was denied due process of law and his constitutional right to effective assistance of counsel.
3. Whether the totality of circumstances of the lineup identification of Appellant, including absence of informed counsel, was presumably so unnecessarily suggestive and conducive to irreparable mistaken identification that Appellant was denied due process of law and his constitutional right to effective assistance of counsel.
4. Whether the in-court identification of Appellant by the witness who made the impermissibly suggestive pretrial identification should have been of independent origin untainted by exposure to improper suggestions.

5. Whether the burden was on the Government to prove by clear and convincing evidence that the in-court identification had an independent source and was not based upon impermissible pretrial confrontations.

6. Whether the Government failed to prove by clear and convincing evidence that the in-court identification had an independent origin.

7. Whether, in view of the trial record, the trial judge failed to make essential findings and conclusions as to the impermissibly suggestive pretrial identifications.

8. Whether the trial judge committed reversible error in charging the jury (a) that it could convict Appellant on both felony-murder and on second-degree murder, (b) that a dead person could be the victim of a robbery, and (c) that a wrongful act intentionally done is done with malice.

9. Whether the entry of erroneous judgments of conviction and imposition of concurrent sentences on some convictions violated Appellant's right of due process of law.

This case has not previously been before this court under the same or other name or title.

REFERENCES TO RULINGS

BRIEF FOR APPELLANT

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No. 24,050

UNITED STATES OF AMERICA,

v.

GREGORY L. BUTLER,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATEMENT OF THE CASE

I. Preliminary Statement

About 7:00 A.M. on February 3, 1969 Leon Epstein (Epstein) was shot to death during a store robbery. Appellant, Gregory L. Butler (Butler) was indicted for, inter alia, felony-murder, second-degree murder, armed robbery, robbery, and assault with a dangerous weapon. The sole eyewitness

was unable to identify either of the two culprits who committed the acts involved in this case. Appellant, after a jury trial, was convicted of these offenses. The trial judge sentenced him to life imprisonment on the felony-murder verdict but refrained from sentencing on the second-degree conviction which, however, he allowed to remain in force. The sentences on the other counts were concurrent.

On this appeal Butler challenges the proceedings below in the following respects:

1. The photographic identification of appellant was impermissibly suggestive.

2. The lineup identification of appellant was impermissibly suggestive.

3. The trial judge failed (a) to consider adequately the totality of the circumstances involved in, respectively, the photographic and lineup identifications of appellant and (b) to rule properly on their legal effects.

4. The trial judge improperly instructed the jury in relation to (a) malice as an essential element of second-degree murder, (b) robbery of a dead person, and (c) permission to convict on both first-degree felony-murder and second-degree murder.

II. The Evidence Received to Prove Appellant Guilty

A. The Testimony of Joseph Robinowitz

Joseph Robinowitz (Robinowitz) was the only person who witnessed these offenses. The following is a

summary of his testimony.

On the morning of February 3, 1969 he and Epstein were and for several years had been employees of Rosenblatt Clothing Company, a men's clothing store located at 641 D Street, N.W. in Washington, D.C. (Tr. 8-9) At 7:00 A.M. on that day, Robinowitz and Epstein arrived at the store for the day's business. Robinowitz removed two padlocks from the front door, and then unlocked and opened the door. Epstein thereupon entered the store, walked forward about 10 to 15 feet and pulled the cord of the ceiling light, thus illuminating the premises. (Tr. 8-10, 25) As Robinowitz was about to enter the store two young men, one about 5 feet-9 inches and the other about 5 feet-7 inches tall, each with a gun, approached him from behind, pushed and then followed him into the store and forced him to lock the door. (Tr. 11, 27) One of the intruders then immediately fired one shot in the head of Epstein, killing him instantly. (Tr. 11-12, 27-28, 30, 36) One soon thereafter searched Robinowitz and took $4.00 from his wallet. The two then beat him on the head and left by the front door. (Tr. 12, 14) Robinowitz did not see either of these offenders search Epstein's body or remove therefrom $100 or a gun, but he heard one man say that Epstein had a gun on his person. (Tr. 41)

When the two culprits left the store, Robinowitz noticed that one, apparently the shorter, was either wearing or carrying a coat similar to some coats in the store's stock. (Tr. 17-19) After they left the store he inspected

the stock of coats on the hangers to ascertain whether any coat had been removed. He observed that one 3/4 length leather coat was missing. Government's Exhibit 1.(Tr. 17,162) showed the hanger on which he had last seen the coat hanging before that morning. Government's Exhibit 2.(Tr. 22, 162) depicts coats similar to those handled by the store for sale and also the type of coat one of the two men had as they left the store.

Robinowitz could not identify Butler as one of the two men who were in the store. (Tr. 42) He estimated that they were there no more than 15 or 20 minutes. (Tr. 41)

B. The Testimony of Allen Colbert

Allen Colbert (Colbert) gave testimony both outside and in the presence of the jury. What follows next is counsel's summary of his testimony while the jury was present.

On February 3, 1969 Colbert was living in Southwest Washington and was working in Silver Spring. (Tr. 77, 87, 89) At about 7:05 or 7:10 A.M. he boarded a northbound Seventh Street bus at E Street, N.W. and seated himself on the extreme right side of the rear seat which ran the full width of the bus. The bus route originated on Market Place, N.W. between Seventh and Eighth Streets, in front of Kann's Department Store. (Tr. 33-84) Colbert then observed Butler at the extreme left side of the same seat. Butler was lying with his feet on the floor, "hunched down on the back seat

as if he didn't want to be seen on the bus." (Tr. 77-80, 82-84, 86, 91-93) Butler was holding a leather coat with white trim. It was "just like" that depicted in Government's Exhibit No. 2. (Tr. 22, 82-83, 162) A few blocks north of E Street, N.W. a man boarded the bus and took a seat in the row immediately ahead of this rear seat and in front of Butler. (Tr. 80, 86) This passenger and Butler, who appeared to be acquaintances, engaged in a conversation. (Tr. 81, 86) Colbert heard Butler tell this man that he and another person had forcibly entered Rosenblatt's store that morning (Tr. 80-81, 87) and had carried away the coat then in his possession. (Tr. 81, 87) Butler told the passenger that he had not obtained any money during this episode. He stated that he had informed his partner in crime that he had warned one of the employees in the store "not to use the gun." Butler told the passenger that he was on his way to his aunt's house on Market (sic) Street, Northwest. (Tr. 81-82) About 25 or 30 minutes after Colbert boarded the bus, Butler alighted at Lamont Street, N.W., carrying the coat. (Tr. 82-83)

C. The Testimony of Dr. Linwood Rayford

Dr. Linwood Rayford testified that he was Chief Deputy Coroner in and for the District of Columbia, had performed an autopsy on Epstein's body on February 3, 1969, and that the cause of death was a gunshot wound of the brain. (Tr. 73-75)

D. The Testimony of Denise Williams

Denise Williams (Miss Williams) testified as follows.

She was 17 years old and on February 3, 1969 she lived at 618 Morton Street, N.W. in Washington, D.C. with her mother, Shirley Williams, and other members of her family. (Tr. 96, 97, 104) About 7:30 A.M. on that day Butler, whom she knew, came to their apartment. Then, in the presence of herself, her mother and Vernon Williams, her brother, he said he had come to their home by bus and had just shot a man and committed a robbery in a store. (Tr. 99-100, 102-103, 105-107) He also said that he had obtained $4.00 from one of the two men in the store and had carried away a black leather coat. He further remarked that he had two guns. Miss Williams saw Butler carry the coat while in the apartment, and she identified Government Exhibit 2 for identifion as the garment in question. (Tr. 101)

E. The Testimony of Shirley Williams

Shirley Williams (Mrs. Williams) testified as follows.

On the morning of February 3, 1969 she and her three children, of whom Denise Williams was one, lived at 618 Morton Street, N.W. in Washington, D.C. (Tr. 141-142) Between 7:15 and 7:30 A.M. Butler knocked on the door of her residence and she admitted him. (Tr. 142, 147-148)

Butler announced that he had just shot somebody

(Tr. 143) and then engaged in a conversation which she, Denise Williams and two others present in the apartment heard. (Tr. 146-147, 149, 151) Butler made the following statements:

a. Over the weekend he and three other persons planned a robbery of Rosenblatt's store, and on that morning the four men went by car to the vicinity of the store and waited across the street until two employees arrived at the door. (Tr. 143, 146)

b. Butler and at least one of the remaining three men followed the employees into the store and had guns pressing against the back of one employee. (Tr. 143)

c. Butler and his associate announced that they were engaged in a robbery, and ordered the employees to give them money and to go to the back room. (Tr. 143)

d. The second employee turned to go to the back room and moved his hand toward his pocket. (Tr. 143)

e. Butler fired a shot at him, intending to hit him in the shoulder. (Tr. 143-144)

f. After shooting the one employee Butler and his associate tied the second employee and moved him to the back room. (Tr. 146, 150)

g. Butler took "a lot of money" from the employee he shot, $4.00 from the other employee and carried away a gun and a coat and then left the store. (Tr. 143-144, 146)

h. Butler then boarded a bus at Kann's Department Store at Market Place at the same time that various policemen

were approaching the locale. He therefore lay down on the back seat as the bus first circled the block to Seventh Street quite close to Rosenblatt's store, and then went north on Seventh Street. (Tr. 146, 150-151)

i. Butler stayed on the bus until he alighted to go to Mrs. Williams' residence. (Tr. 143)

When Butler entered the Williams apartment he was carrying a shopping bag. Mrs. Williams saw that it contained two guns and a black leather coat. (Tr. 144, 151) Butler removed the guns and showed them to her. (Tr. 144, 151) The coat looked like the black leather coat marked as Government's Exhibit 2 for identification. (Tr. 144) In her presence, Butler counted a sum of money, including three $20 bills, which she thought was over $100. (Tr. 144, 152) He took the coat with him when he left the premises. (Tr. 152) She did not go to the police but they called her at her place of employment and told her to come to the Homicide Headquarters on February 27, 1969 at 6:15 P.M. The story Butler told was fixed in her memory by a radio newscast she heard while driving to work the same morning Butler was at her home. (Tr. 148) Later she learned from what she had read in the newspaper and had heard on the radio, that there was a large reward offered for information leading to the arrest of the person who had killed Epstein. (Tr. 153)

F. The Testimony of Police Officer Robert Pratt

Police Officer Robert Pratt testified that

on February 5, 1969 while on duty as a policeman in Washington, D.C. he arrested Butler. He recognized Government Exhibit 2 for identification and described it as a black leather coat with white trim. At the time of the arrest Butler was wearing the coat and Officer Pratt removed it from his person. (Tr. 154-155)

IV. The Testimony of Appellant Gregory Butler

Butler testified as follows.

He spent the night of February 2, 1969 at 204 Eleventh Street, S.E. in Washington, D.C. and at 7:00 A.M.. the next morning he boarded a bus at Seventh Street and Pennsylvania Avenue, S.E. and alighted at Seventh Street and Pennsylvania Avenue, N.W. where he crossed the park and boarded a Silver Spring and Tacoma Park bus going north on Georgia Avenue. (Tr. 165-166, 170) His destination was his aunt's residence at 618 Morton Street, N.W. and his purpose was to see his stepfather there and seek his aid in obtaining employment. Shirley Williams, his aunt, admitted him into the apartment. Present also were another aunt named Diana Bond, her small son, and both Joseph Williams, and Butler's stepbrother Vernon. (Tr. 166-167, 171)

Butler denied that he had carried a paper bag or that he told Shirley Williams or Denise Williams that he had shot Epstein or had shown them how he had done so. He also denied that while he was on the northbound Georgia Avenue bus (a) he had carried two pistols, (b) he had seen Colbert,

(c) he had said anything about going to his aunt's residence or (d) he had shot someone at Rosenblatt's store. (Tr. 167, 174-175)

Butler admitted that he had the black leather coat marked Governme t's Exhibit 2 for identification when he was at his aunt's home and when he was arrested. (Tr. 168) He said he had bought it on February 1, 1969 from a "fence man" at 12th and K or L Streets. (Tr. 167-168)

V. The Photographic Identification by Colbert

Before testifying in the presence of the jury, Colbert gave testimony at about 3:00 P.M. of the first day of the trial in a so-called Simmons, Wade, Gilbert, Stovall hearing before the trial judge. (Tr. 47) The subject matter was the suggestibility of both Colbert's photographic and lineup identifications of Butler on February 13, 1969, ten days after Epstein was killed and eight days after Butler was arrested. (Tr. 61, 137, 154-155) Colbert supposedly based these identifications on his observation of the episode on the bus where he, Butler and a third person were allegedly passengers. A summary of Colbert's testimony is set forth above.

Some material details of this photographic identification by Colbert are unknown. First and foremost, the photographs themselves were not available to the court, counsel and witnesses when Colbert was testifying about them. (Tr. 57, 59, 136) Before Colbert began his testimony in

this nonjury hearing the prosecutor told the judge that he did not even know then whether Colbert had in fact made a photographic identification and he had not theretofore been told that one had been made. (Tr. 48, 63) Both defense counsel made the same statement to the trial judge, demanded the pictures before Colbert testified in order to determine whether they impermissibly suggested the identification of Butler. (Tr. 48-49, 57, 63, 65, 67-68, 71)

Colbert testified that a few days after the bus episode a detective at the office of the Homicide Squad showed him more than a dozen pictures, of negro males about 19 or 20 years old, and asked him if he "could recognize the person that was on the bus." After looking at these photographs Colbert testified (a) that he "was able to recognize the photograph of the person" he "saw on the bus," (b) that he had no difficulty in locating his picture, and the picture w.s that of Butler, and (c) that his identification at the time of the hearing was "based on the fact that that is the person that" he "saw on the bus and" he "didn't forget his face when" he "went down to the Homicide Squad." (Tr. 54-55, 70) The prosecutor then asked Colbert the following question:

> Has the fact that a reward has been posted in this case, has that influenced you in any way to make a rash or precipitous identification of this man?

Colbert did <u>not</u> answer. (Tr. 70) The foregoing account by Colbert fails to deal with several <u>vital</u> details which counsel hereinafter enumerates.

Detective James E. Greenwald (Greenwald) testified (a) that he had taken part in investigating Epstein's death; (b) that he was in the office when and where the photographs in question were shown to Colbert; (c) that he himself did not exhibit them to him but it was Detective Raymond M. Pearson (Pearson) (also named "Pierson" in the transcript), who was also assigned to this investigation, (d) that Pearson handed Colbert a "group or stack" of 10 or 12 pictures and "said if there is anybody in there that you can identify"; (e) that he (Greenwald) did not remember whether Pearson or any other person said anything else to Colbert but that Pearson could have said something which he (Greenwald) did not remember; (f) that one of these photographs was that of a suspect and that Butler was the person in question; and (g) that the pictures which Colbert saw on this occasion had not been preserved. (Tr. 58-62) The trial transcript does not disclose (a) what, if any, answer Colbert gave or comment he made to Pearson's alleged question to him as to whether he could identify any person whose picture was among those shown to him or (b) what his conduct was at that time.

Detective Pearson denied any involvement with Colbert's photographic identification of Butler. He said that he was not present on this occasion but that Detective Sergeant [John C.] Wilson had told him that Government's Exhibit 6 comprised the photographs which had been shown to Colbert. (Tr. 138-140) In connection with Pearson's testimony the prosecutor told the court that during the evening

of December 2, 1969 (following the first day of the trial) the detectives located a spread of pictures which were shown to Colbert and that on the inside flap of a picture of Butler were the initials "AC," and also the date "2-13-69." The prosecutor while examining Pearson had these pictures marked and identified as Government's Exhibit 6 for identification. (Tr. 133-134, 138) Defense Counsel told the court that the pictures were "suggestive" of Butler (Tr. 135) and that Sergeant Wilson, allegedly retired and sick, might have been able to testify on this issue. (Tr. 139)

The trial judge made some comments and rulings in relation to the suggestibility of these pictures. He did so before Pearson found and produced them in open court and also before Colbert testified that his identification was based on the fact that Butler was the person on the bus who stated he had shot Epstein and taken the coat. The judge thought that 10 or 12 pictures of persons described as negro males 19, 20 or 21 years old coupled with the view on the bus was sufficient in favor of the Government on the question of suggestibility even though the pictures were not available. The judge ruled that "there was nothing suggestive in the showing of 10 or 11 pictures to Colbert" and that "Colbert had an independent source for his identification." (Tr. 176) The judge ruled that in this situation the burden was on the defense to show the photographic identification was impermissibly suggestible. Without any proof of the totality of Detective Sergeant Wilson's conversations with Colbert, the

judge ruled that no suggestions had been made by a police officer to Colbert. The judge accordingly ruled that he would permit testimony as to the photographic lineup (hereinafter described) and in-court identification of Butler by Colbert. (Tr. 66-68)

Government's Exhibit 6 for identification contains four colored photographs, of which one is that of Butler, and seven black and white photographs, of which none is that of Butler. The four colored photographs, on their face, show the following details:

Subject Photographed	Date of Picture	Day of Week
Subject #1	1/26/68	Friday
Subject #2	8/17/68	Saturday
Subject #3	9/18/68	Wednesday
Subject #4	2/ 5/69	Wednesday

Subject #4 was Butler, and the record is silent as to whether Colbert noticed (a) that his photograph was taken on February 5, 1969, two days after Epstein was killed, and (b) that the other three persons involved here had their photographs taken before this event by 375, 172 and 140 days, respectively. Moreover, the back of Butler's photograph does not state the offense charged against him but each of the other three colored photographs does, and also the age, and for some, the height and weight, as is seen in the following chart:

Subject No.	Last Name	Date of Picture	Day of Week	Age	Ht.	Wt.	Offense
#1	David	1/26/68	Friday	21	5-7½	155	Robbery Holdup Street Gun
#2	Gleason	8/17/68	Saturday	19			Assault WI Rob
#3	Harling	9/18/68	Wednesday	20	5-11	173	Bank Holdup, Amer. Sec.& Tr. Co., 5911 Blair Rd. N.W. on 7/17/68
#4	Butler	2/5/69	Wednesday	18	5-4		

The seven black and white photographs bear the following inscriptions:

Name of Person Photographed	Date of Photograph	Age	Date of Birth	Ht.	Wt.
	1/19/68		9/27/40		
Theodore Watson, Jr.	3/10/68				
Willie Streator	10/11/68				
Clifton Larry Taylor	11/11/68				
Theodore John Moore	11/21/68		2/ 5/41	5-7	132
Kevin Brown	12/20/68	18		5-11	154
Donald Ray Dooffin	1/ 6/69		10/29/52	5-6	168

VI. The Lineup Identification by Colbert

Colbert attended a lineup and made a lineup identification of Butler on the same evening he made the aforesaid photographic identification. (Tr. 55, 61, 137) Butler wore the same clothes at both the photographic and

lineup identifications. Colbert testified (a) that a policeman asked him if he could recognize the person that he "picked out in the picture as the person" he had seen in the bus. (Tr. 56); (b) that he was able to identify someone in the lineup and that person was Butler; (c) that Governmert's Exhibit 5 for identification was an accurate and fair photographic representation of the lineup; and (d) that he recognized in this exhibit the photograph of Butler as being the fourth person from the left. (Tr. 56-57)

Defense counsel's comment before Colbert testified was,

> I am not saying anything about the lineup itself because I understand he was represented by counsel at that time. . . . we dont' know whether counsel at that time knew of these pictures. (Tr. 49) (Emphasis added)

After Colbert gave the foregoing testimony relating to the lineup, defense counsel commented (a) that Colbert first saw Butler's picture and then saw his person and then identified him; and (b) that the lineup identification was impermissibly suggestive after a photographic identification. (Tr. 65, 68, 71) The judge, however, said he would admit the lineup identification if the Government desired. (Tr. 176)

The details of this lineup identification as shown by Government's Exhibit 5 for identification, the photographic representation thereof, are partly seen in the following chart, with the subjects arranged in the order they were placed from left to right, with Butler fourth from the left:

Subject #1	Subject #2	Subject #3	Subject #4
About 5-10½	About 5-9½	About 5-9¼	About 5-7
mustache	mustache	mustache	no mustache
white shirt	light tan windbreaker	white shirt without tie	light brown V neck sweater with collar
black tie	light tan pants	heavy	white pants
suit coat pants	About 160	about 175	about 130
thin			
about 150			

Subject #5	Subject #6
About 6-1	About 5-9 1/8
mustache	turtleneck sweater with narrow white stripe around bottom and neck and vertical strip from right side of neck to bottom
black windbreaker with collar	about 150
black pants	
about 175	

The record is silent as to whether Colbert noticed the striking contrast of the appearances of Butler and the other five men in the lineup, respectively, as seen in the noticeable differences when compared as they stood side by side.

VII. Aspects of Procedure, Rulings and Instructions

After the Government and the defense rested, the court denied counsel's motions (a) for a directed verdict on the count charging robbery of Epstein since a dead person cannot be subjected to force and fear and be deprived of property and (b) for a mistrial due to the Government's failure to produce the police officer to identify the pictures

and to show an absence of suggestibility to Colbert at the lineup. (Tr. 159-161, 177-178)

Before the court instructed the jury there was a discussion of the propriety of a verdict of guilty of both felony-murder and second-degree murder and the jury's consideration of second-degree murder only if the jurors think the first-degree murder charge has not been proved. Defense counsel stated that the evidence did not support both charges and a guilty verdict had to be either of felony-murder or second-degree murder but not both. (Tr. 180-185) Although Fuller v. United States, 132 U.S.App. 264, 407 F.2d 1199 (1968) was cited and analyzed during the colloquy, the court said:

> Well, I think the safe thing to do is to submit this to the jury on the basis that they could find the defendant guilty of both counts, felony-murder and second-degree murder. (Tr.m185)

Pursuant to this view, the trial judge instructed the jury on both felony-murder and second-degree murder but did not instruct the jury to consider the question of second-degree murder only if the Government had failed to make a felony-murder case.

The judge instructed the jury that a dead person could be the victim of a robbery. (Tr. 48-49)

He also instructed the jury in relation to malice as an element of second-degree murder that

> In determining whether a wrongful act is done with malice, you may infer that a person ordinarily intends the natural and

probable consequences of acts knowingly done or knowingly omitted. (Tr. 42)

ARGUMENT

I. THE PRETRIAL PHOTOGRAPHIC AND LINEUP IDENTIFICATIONS MADE OF APPELLANT TEN DAYS AFTER THE OFFENSES AND EIGHT DAYS AFTER HIS ARREST, BOTH DURING HIS DETENTION AS A SUSPECT, WERE CRITICAL STAGES OF THE ACCUSATORIAL PROCESS AND APPELLANT WAS THEREFORE ENTITLED BY THE SIXTH AMENDMENT TO THE ASSISTANCE OF COUNSEL.

When a suspect is in custody, the display of his person or his photograph to a witness for identification purposes is a critical stage of the law-enforcement process. Any such confrontation between the suspect and the witness could be, intentionally or unintentionally, inherently and incurably suggestive and otherwise unfair and thus lead to a mistaken identification. Such a false identification would deprive a defendant of his constitutional right to a fair trial. It is sometimes difficult or impossible to ascertain whether improper methods were used in a lineup or other identification procedures. Accordingly, a suspect is entitled whenever feasible to notice and an opportunity for counsel to be present at the identification proceeding, whether at a lineup or an arraignment, squad room, prosecutor's office or elsewhere.

The foregoing paragraph is a statement of the judicial theory and rationale expressed in many opinions during the past four years. In United States v. Wade, 388 U.S. 218 the Court at pages 228-229 said:

> The vagaries of eye witness identification are well known; the annals of criminal law

> are rife with instances of mistaken identification, • • • .

In Simmons v. United States, 390 U.S. 377 (1968) the petitioner claimed that his conviction was void because it was tainted by an unduly prejudicial identification procedure. In this connection the Court at page 383 observed:

> It must be recognized that improper employment of photographs by police may sometime cause witnesses to err in identifying criminals. • • • Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police • • • show him the pictures of several persons among them which the photograph of a single such individual recurs or is in some way emphasized.[2]

In footnote 2 the Court referred to P. Wall, Eye-Witness Identification in Criminal Cases 74-77 (1965). At page 68 the same author says:

> • • • where a photograph has been identified as that of the guilty party, any subsequent corporeal identification of that person may be based not upon the witness's recollection of the features of the guilty party but upon his recollection of the photograph. Thus, although a witness who is asked to attempt a corporeal identification of a person whose photograph he has previously identified may say "That's the man that did it," what he may actually mean is, "That's the man whose photograph I identified." (Footnote omitted)

See also Williams and Hammelmann, Identification Parades, Part I [1963] Crim. L. Rev. 484.

In view of these dangers of eye-witness identification, the Supreme Court has formulated two distinct principles for

challenging eye-witness identifications. In United States v. Wade, 388 U.S. 218 (1967) and Gilbert v. California, 388 U.S. 263 (1967) the Court held that an identification confrontation is a "critical" stage of the accusatorial process, at which a defendant is entitled by the sixth amendment to assistance of counsel. In Wade the Court held a lineup "critical" because

> . . . the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. 388 U.S. at 228

Therefore, if a person made an out-of-court-identification in the absence of counsel, in order for him to make a later in-court identification, the Government must show by clear and convincing evidence that such identification was based on an independent source. On the same day that it decided Wade and Gilbert the Court held that an identification must be suppressed if in viewing "the totality of circumstances," the confrontation was "so unnecessarily suggestive and conducive to irreparable mistaken identification that [defendant] was denied due process of law." Stovall v. Denno, 388 U.S. 293, 301-302 (1967).

The presence of counsel at identification confrontations, other than lineups, may be as or more essential and for the same reasons as the Supreme Court observed in Wade. The Court had in mind the objectives of (a) minimizing the likelihood of an unduly suggestive confrontation and (b) enabling an informed challenge at trial to either the admissibility or the credibility of

identification evidence.

The Court of Appeals for this circuit has shown a full awareness of the requirement of counsel at various kinds of pre-trial informal pre-arrest confrontations. "Indeed, the more informal the confrontation procedure, the greater is the danger of ascertaining at trial the facts of the confrontation." (Page 5 of Slip Opinion, Long v. United States, No. 22,218 decided December 18, 1969, holding that suspect before arrest was entitled to counsel at squad-room confrontation. Because the sources of suggestiveness in an eye-witness identification are subtle and the suspect is less likely to be alert to the need for safeguards when no formal process has issued against him, the Court reached the same result in United States v. Greene, No. 22,923 decided April 29, 1970 in relation to confrontation in a prosecutor's office. The same reasoning and result obtained in Mason v. United States, 134 U.S.App.D.C. 280, 414 F.2d 1176 (1969) and United States v. York, No. 22,468, decided September 24, 1969, in relation to view of suspect in courtroom. And in Rivers v. United States, 400 F.2d 935,939 (5 Cir. 1968) the Court held Wade applicable "to any lineup, to any other technique employed to produce an identification and a fortiori to a face-to-face encounter between the witness and the suspect alone, regardless of when the identification occurs, in time or place . . . ." In Clemons v. United States, 133 U.S.App.D.C. 27, 37 408 F.2d 1230, 1240 (1968 en banc) this Court, speaking of preliminary-hearing identifications, said:

> It is, of course, possible for a non-lineup confrontation to be held under conditions which assimilate it very closely to a lineup, and this is what the trial court essentially found was the case here. It must be evident, however, that the conditions of such a confrontation are much harder to control than those of a formal lineup, and that it is also much more difficult to establish by clear and undisputed testimony exactly what those conditions were. It is, at the least, a practice fraught with perils to a degree suggesting its sparing use as the part of prudence.

The Government has frankly conceded that a photographic confrontation carries more risk of mistaken identification than does the formal lineup. In its brief in Wade in the Supreme Court, (No. 334, October Term, 1966) the Department of Justice at page 7 said:

> There is no meaningful difference between a witness' pre-trial identification from photographs and a similar identification made at a lineup.

And then at page 14 the Department said:

> The techniques of pretrial identification vary, of course, in the extent to which they afford verification of the accuracy of the witness' testimony. A lineup or a showing of a series of photographs tests the witness and may provide, in certain circumstances, reasons to doubt the truth of his story; observation of the accused when he is unaccompanied is a less reliable indicator of the witness' accuracy or probity. (Emphasis added)

In United States v. Hamilton (No. 22,361, decided July 24, 1969), this Court was mindful (a) "of the hazards inherent in the use of photographs for purposes of identification" and (b) "of the consequent need for care whenever that process is employed" (Slip Opinion, page 5).

This Court has therefore clearly and cogently recognized the possible need for counsel at photographic identifications in the interest of fairness and avoidance of impermissible suggestiveness. In United States v. Kirby, No. 23,106, decided April 24, 1970, the Court envisioned a "prophylactic rule" requiring the appointment of counsel for one who is not present at the time of identification but has been arrested for or charged with the crime and is in custody. In Kirby the Court referred to Thompson v. State, ____ Nev. ____, 451 P.2d 704, cert. den. 396 U.S. 893 (1969) in connection with the view there expressed of need for counsel at a photographic identification, unless and until the photographs shown to the identifying witness are preserved and available at trial in order to rebut a claim of suggestiveness. See also Hamilton, supra

The foregoing discussion implies situations other than prompt on-the-scene confrontations, such as were involved in Russell v. United States, 133 U.S.App.D.C. 77,408 F.2d 1289, cert. denied 395 U.S. 928 (1969) and United States v. Wilson, ____ U.S.App.D.C. ____, No. 23,283, decided May 20, 1970. Except conceivably in the Russell and Wilson type of confrontation, it is not urgent or necessary for a witness ever to confront a suspect in a suggestive manner, and it is not reasonable for his counsel to be absent. Gregory v. United States, 133 U.S.App.D.C. 317, 410 F.2d 1016 (1969); Mason v. United States, 134 U.S.App.D.C. 280, 414 F.2d 1176 (1969).

In Wade the Supreme Court expounded the practical, useful and essential role of counsel at a lineup identification. In

footnote 27 (388 U.S. at 238) the Court said that "counsel's presence may eliminate the hazards which render the lineup a critical stage." And see United States v. Allen, 133 U.S.App.D.C. 84, 408 F.2d 1287 (1969) where the Court noted that "the presence of counsel serves not only to allow an informed challenge to be made to identification evidence at trial," but also "to minimize the likelihood of an unduly suggestive confrontation." Moreover, in Long, supra, the Court observed that the function of counsel is more vital and essential in confrontation procedures less formal than the lineup because the danger of suggestiveness is greater.

The pretrial photographic and lineup identifications of Butler ten days after the offenses and eight days after his arrest, both during his detention as a suspect, were critical stages of the accusatorial process in this case. Butler therefore had the constitutional right to the assistance of counsel at both these pretrial identifications. We will hereinafter develop the adverse effects of the absence of counsel at the impermissibly suggestive identifications which Colbert made.

II. THE TOTALITY OF CIRCUMSTANCES OF THE PHOTOGRAPHIC IDENTIFICATION OF APPELLANT, INCLUDING ABSENCE OF COUNSEL, WAS PRESUMABLY SO UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLE MISTAKEN IDENTIFICATION THAT APPELLANT WAS DENIED DUE PROCESS OF LAW AND HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

We have set forth in our Statement of the Case, supra, the details, as shown by the record, of the photographic identification of Butler eight days after his arrest. Before Colbert told his story at the nonjury hearing, Detective Greenwald

testified he was in Homicide Squad headquarters and saw Detective Pearson hand Colbert a group of pictures and ask whether any was that of the person on the bus who admitted shooting someone in a store and taking a coat. Greenwald further testified (a) he did not remember whether Pearson said anything else to Colbert and (b) the photographs in question had not been preserved. Pearson, however, later testified that he was not present on this occasion but Detective Sergeant Wilson was the officer who showed Colbert the pictures. Wilson, he said, had quit the police force and was presently ill, and hence was unavailable as a witness.

The photographic identification was impermissibly suggestive. Of the four color photographs which Colbert saw, three were taken long before the offenses on February 3, 1969 and Butler's was taken two days after. Butler's photograph did not indicate the offense for which he was held, but the other three bore inscriptions that the offenses, respectively, were Armed Street Robbery, Assault with Intent to Rob, and Bank Robbery. One of these three photographs indicated 5 feet 11 inches and 173 pounds for the person depicted in it. The seven black and white photographs also improperly focused Colbert's attention on Butler. They bore inscriptions showing they were all taken before the Epstein killing and one person whose photograph Colbert saw was 5 feet 11 inches tall, another weighed 168 pounds and was 5 feet 6 inches tall, two of the three persons were 28 years old.

Butler's defense suffered from both the totality of the circumstances of the photographic identification and the handicaps of defense counsel who (a) had no knowledge until the trial started

that this confrontation had occurred and (b) had not seen the eleven photographs which on their faces and backs virtually told Colbert whose photograph to select. If defense counsel had been present at Colbert's viewing of the photographs he could have observed enough to have aided in making possible an accurate reconstruction for the court and jury. And even if he had not been present, his inspection of the pictures at the trial would also, but to a lesser extent, have enabled him to conduct a meaningful and effective cross-examination of Colbert.

This improper photographic identification is a graphic example of the kind of suggestive confrontation which has often troubled courts over the years. In United States v. Robinson, ___ U.S.App.D.C. ___, No. 22,876, decided October 14, 1970, this Court on page 3 of the slip opinion said that "it may be true that in certain instances a date placed on the picture [exhibited for identification purposes] will be overly suggestive." In Hamilton, supra, the Court recognized that in some situations a photograph could be "highlighted" and its selection in some way prompted. In Greene, Hamilton, Long, and Mason, supra, this Court showed awareness of the difficulty or impossibility of reconstructing the exact circumstances of the pretrial identification. Certainly, according to such cases as Wade, Stovall, and Clemons, supra, defense counsel is entitled to information from the prosecution during the trial as to what happened in the confrontation. Defense counsel, of course, has both a right and a duty to conduct an intelligent, informed and meaningful cross-examination of witnesses' pretrial identification procedures. Simmons v. United

States, supra, at 347-348, where the Court spoke of "improper employment of photographs by police [which] may sometimes cause witnesses to err in identifying criminals" and then observed that,

> [the] danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error.

See Note, Confrontation, Cross-Examination, and the Right to Prepare a Defense, 56 Geo. L. J. 939,946 (1968).

III. THE TOTALITY OF CIRCUMSTANCES OF THE LINEUP IDENTIFICATION OF APPELLANT, INCLUDING ABSENCE OF INFORMED COUNSEL, WAS PRESUMABLY SO UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO IRREPARABLY MISTAKEN IDENTIFICATION THAT APPELLANT WAS DENIED DUE PROCESS OF LAW AND HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Colbert's lineup identification of Butler was highly improper on several counts. It occurred the very same evening that Colbert had made the photographic confrontation, and while Butler was wearing the very same clothes. The photograph of this lineup (Government's Exhibit 5 for identification) shows Butler to be about 5 feet 7 inches tall, weighing about 130 pounds, and standing between one person about 5 feet 9½ inches tall and weighing about 175 pounds and another person about 6 feet 1 inch tall and weighing about 175. Of the six men in the lineup, all except Butler, wore mustaches and each of the five was more than 5 feet 9 inches tall. The marked disparity of appearance among the six men Colbert viewed thus brought Butler into very sharp focus.

Moreover, very material to this appeal is the fact that

Butler did not have effective and informed assistance of counsel. Before Colbert testified Butler's counsel told the judge (a) that he understood that Butler was represented by counsel at the lineup but (b) that he did not know whether Butler's attorney at the time knew that Colbert had theretofore made a photographic identification. The record on appeal is devoid of any other details and of any basis whatsoever for inferring that Butler was protected at the lineup as is contemplated by Wade, Gilbert and Stovall, expounded above. If we assume, merely on counsel's statement at trial of his understanding, that Butler was in fact represented by counsel at the lineup, we must nevertheless conclude that this confrontation not only did not minimize but on the contrary did clearly maximize the likelihood of an unduly suggestive selection of Butler by Colbert. In Simmons, supra, (390 U.S. at 383-384) the Court discussed the improper use of photographs which may have suggestive effects. At page 384, the Court said:

> Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Counsel submits that Colbert's lineup identification was more influenced by the picture of Butler which he had seen shortly before on the same evening than the image of Butler whom he allegedly had seen on a bus ten days earlier. This Court saw a graphic instance of this phenomenon in Mason, supra. There the complainant, a bank teller, admitted at trial that it was "hard to separate the images" of the man at her window who defrauded

her, the man whose photograph the police showed her, the man whom she viewed at a preliminary hearing, and the defendant at trial. (Emphasis added) At all such photographic and other confrontation identifications, there is a patent substantial risk that the procedure may be one which, in the words of the Supreme Court, "infects the truth-determining processes at trial." Stovall (388 U.S. at 293). In Foster v. California, 394 U.S. 440 (1969) the Court reversed a conviction because the lineup procedure "so undermined the reliability of the eyewitness identification as to violate due process" (page 443). The Court said (a) that the suggestive elements operating there coerced the petitioner's identification, and (b) that judged by the Simmons standard the case before the Court "presented a compelling example of unfair lineup procedures." One impressive fact was that petitioner "stood out from the other two men by the contrast of his height."

This Court has had occasion to consider possible violations of due process in lineup cases. In Clemons, supra, the Court was sensitive to the possibility of bringing a suspect "into a focus unacceptably antithetical to the lineup principle." See also Kirby, supra. (Slip opinion at 4, n. 2) Marked disparity in appearance has concerned this Court in such cases as Mason, supra, Lewis, supra, and Patton v. United States, 131 U.S.App.D.C. 197, 403 F.2d 923 (1963).

What the police did in Butler's lineup identification was unnecessary, unsound and unfair and contravened the canons of lineup procedure which have appealed to this Court. In United States v. Allen, 133 U.S.App.D.C. 34, 408 F.2d 1287 (1969) this

Court suggested that in the interest of effective assistance of counsel and justice, the attorney representing a suspect in a lineup should have the following advance information:

1. The names of the witnesses who would attend;
2. The time, place and nature of the crimes involved;
3. The descriptions of the suspect, if any, which the the witnesses had given the police.

The Court also suggested the possible feasibility of allowing counsel to have a role in arranging the lineup and proposing changes to avoid suggestive features. See also Lewis, supra.

According to the record on appeal, the lineup clearly was not conducted in such a manner as to minimize the likelihood of an unduly suggestive confrontation. If a competent and informed lawyer had represented Butler at the lineup, he would have objected to this confrontation occurring so soon, (the very same evening), after the photographic identification when the suspect was dressed exactly the same in both instances and when his image was still fresh in the mind of the viewer. The lawyer also would have objected to the gross disparity in appearance of the six persons who comprised the lineup.

On this record we cannot discern the circumstances of this confrontation. We do not know (a) whether the photographic identification had an unavoidable effect on the lineup, (b) whether Colbert was told that someone in the lineup was a suspect, (c) whether any police officer in any other way primed him to select Butler, (d) whether any police officer said any thing else to Colbert of a suggestive nature, (e) whether his recollection of

the image of the man on the bus was vague before he saw in the same evening the photograph and the person of Butler, (f) whether he hesitated and appeared unsure when he began observing the six men in the lineup, and (g) whether he watched them with fixed attention.

It is clear that Wade intended something more than the mere presence of a lawyer at a police lineup-confrontation. Wade certainly required that an accused should have effective assistance of counsel at any identification confrontation, except conceivably those subject to the exigencies of prompt on-the-scene observations. Moreover, in order to render effective assistance, counsel must have an opportunity to consult with the suspect and to inform himself, as a minimum, of the ingredients of the accusations and proceedings and also (a) the names of witnesses, (b) prior descriptions given to police and (c) prior identifications. See this Court's so-called "Allen" order issued October 16, 1969 in Wilson v. Wilson, No. 23,548, which states that on the record there the Court saw no reason why the right to effective assistance of counsel does not require that the description of the suspect as given to the police be made available to counsel for the appellant at the lineup." If we can accept the unsubstantiated statement of defense counsel at trial that he understood Butler was represented by counsel at the lineup but he did not know whether such lineup counsel knew of the prior photographic identification, then we must conclude, nevertheless, that such counsel did not possess the requisite knowledge to render effective assistance at the lineup. Accordingly, Butler's rights under Wade and

Stovall were violated. See Campbell v. United States, No. 22,214, decided June 23, 1970, where this Court reversed for a remand pursuant to the principles announced in Clemons, supra.

We close this argument on the lineup aspects of this appeal by a reference to our discussion of the photographic identification of Butler, supra. We reaffirm and adopt here what we said there, and we stress again the useful role of counsel in helping to reconstruct a pretrial identification confrontation. By this process counsel vindicates his duty and his right to conduct a meaningful material cross-examination in relation thereto. Butler's counsel was improperly foreclosed in this respect.

IV. THE IN-COURT IDENTIFICATION OF APPELLANT BY THE WITNESS WHO MADE THE IMPERMISSIBLY SUGGESTIVE IDENTIFICATIONS SHOULD HAVE BEEN OF INDEPENDENT ORIGIN AND UNTAINTED BY EXPOSURE TO IMPROPER SUGGESTIONS.

The law is firmly established that an in-court identification must have an independent origin. It must not be based upon an observation of the suspect at a pretrial confrontation. Support for this proposition is found in several of the cases cited and discussed above, including Wade (at pages 240-242), Gilbert (at pages 273-274), and the following cases in this Court. Gregory, Lewis, Mason, Mendoza, Patton and Williams, supra.

V. THE BURDEN WAS ON THE GOVERNMENT TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE IN-COURT IDENTIFICATION IN QUESTION HAD AN INDEPENDENT SOURCE AND WAS NOT BASED UPON IMPERMISSIBLE PRETRIAL CONFRONTATIONS.

The law is also firmly established that if there is evidence of a totality of circumstances of a confrontation so

unnecessarily suggestive and conducive to irreparable mistaken identification that a defendant is denied due process of law, then the Government has the burden to prove by "clear and convincing evidence" that the in-court identification had an independent origin and was not tainted by impermissible suggestion. Support for this proposition is found in several cases cited and discussed above, including Wade (at 240-241), Gilbert (at 273-274), Long, Mason, Williams, and York, supra.

VI. A NEW TRIAL IS REQUIRED BECAUSE THE GOVERNMENT FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT THE IN-COURT IDENTIFICATION IN QUESTION HAD AN INDEPENDENT ORIGIN, AND THE TRIAL JUDGE FAILED TO MAKE ESSENTIAL FINDINGS AND CONCLUSIONS AS TO THE IMPERMISSIBLY SUGGESTIVE PRETRIAL IDENTIFICATIONS.

The Government offered no evidence to destroy the presumption that the photographic and lineup identifications were so unnecessarily suggestive and conducive to irreparable mistaken identification that Butler was denied due process of law. The trial judge compounded this violation of Butler's rights by failing to consider the myriad undisputed and undisputable facts comprising the two challenged identifications, which nullify the identification made at trial. In fact, a scrutiny of the entire record on appeal does not indicate that the judge had any awareness of the flaws of the identifications.

Counsel for appellant submits that on this record this Court can conclude that the two pretrial confrontations were unnecessarily suggestive. See Gregory, supra, where the Court reached the same conclusion as to two confrontations in that case. If, however, the Court should deem the trial record inadequate

then it can reverse and remand for a Wade-Stovall hearing. Support for this judicial action is found not only in Wade and Gilbert, supra, but also in the following cases of this Court cited and discussed above: Jones, Mason, Mendoza-Acosta, Sera-Leya, Smith, Wright, York, and Young, supra.

VII. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR IN INSTRUCTING THE JURY (A) THAT IT COULD CONVICT ON BOTH FELONY-MURDER AND SECOND-DEGREE MURDER, (B) THAT A DEAD PERSON COULD BE THE VICTIM OF A ROBBERY, AND (C) THAT A WRONGFUL ACT INTENTIONALLY DONE IS DONE WITH MALICE.

B. The trial judge, over the timely and specific objection of defense counsel, instructed the jury that Butler could be indicted and convicted on both counts of felony-murder and second-degree murder for a single homicide. We have set forth in our Statement of the Case, supra, the colloquy between court and counsel before the charge to the jury. Defense counsel contended that a guilty verdict had to be either felony-murder or second-degree murder but could not be both. The problem here was canvassed in a scholarly opinion in Fuller v. United States, 132 U.S.App.D.C. 264, 295, 407 F.2d 1199, 1230 (1968 en banc) where the Court said:

> The jury may consider the issue of second-degree murder on an indictment of first degree felony-murder only if it finds some defect with the proof as to felony-murder. (Emphasis added)

And the Court also said that if a request, motion or objection is made by the defendant, the judge, in charging the jury with respect to both felony-murder and second-degree murder, should instruct the jury to consider the question of second-degree

murder only if the jurors determined that the Government had failed to prove the first-degree murder count. In Fullard v. United States, 134 U.S.App.D.C. 95, 97, 413 F.2d 369, 370 (1969) the Court cited Fuller in connection with an indictment charging, inter alia, first-degree felony-murder and second-degree murder. The Court said:

> Fuller goes on to hold that in the case of such an indictment the court on request should instruct under the lesser included offense doctrine, with only one such guilty verdict permissible. (Emphasis added)

B. The trial judge, over the timely and specific objection of defense counsel, charged the jury that it could convict Butler for the robbery of a dead person. 22 D.C. Code Sec. 2901 provides:

> Whoever by force or violence, whether against the resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, ...

The statute by its terms thus defines robbery as a forceful or violent wrongful taking of someone's property. The means of performing this act of force or violence is (a) resistance to someone or (b) instilling fear in someone or (c) sudden or stealthy seizure or snatching. Construing this statute, the Court in Hunt v. United States, 115 U.S.App.D.C. 1, 4, 316 F.2d 652, 655 (1963) noted that the offense of robbery contains some elements absent in the act of larceny, and reversed a robbery conviction because every fact proved by the Government was as consistent with the lesser offense of larceny. In Byrd v. United States, 119 U.S.App. D.C. 360, 361, 342 F.2d 939,940 (1965) the Court criticized the trial judge in a robbery case for defining "robbery" in his jury

charge by reading the statute. This Court said:

> This was not sufficient. The statute does not even set forth all the essential elements of the offense.

The Court cited Neufield v. United States, 73 U.S.App.D.C. 174, 189, 118 F.2d 375, 390 (1941) as authority for the proposition that Congress in the robbery statute (22 D.C. Code Sec. 2901) "meant to make robbery a crime, and by robbery it meant robbery in the usual common law sense of the term . . . ." 2 Wharton, Criminal Law and Criminal Procedure (Anderson Edition, 1957) Sec. 545, page 241-243 says:

> Robbery is the unlawful taking of property of any value from the person or in the possession of another by means of force or by putting him in fear . . . . In the absence of statutory modification, the Constituent elements of the offense of robbery are
>
> 1. a felonious taking,
> 2. accompanied by an asportation, of
> 3. personal property of value
> 4. from the person of another or in his presence,
> 5. against his will,
> 6. by violence or by putting him in fear,
> 7. animus furandi.

It thus appears that robbery, requires as a minimum, the element of force or fear. In Mitchell v. State, 408 P.2d 566 (Okla. Crim.App. 1965) at 570 the Court said:

> In our opinion, this Statute was specifically designed to distinguish between the robbery, larceny and burglary statutes. . . . The stealthy or secret taking of property from the person of another before the victim is aware of what is being done is not robbery. . . . To constitute robbery the taking of the property must be accomplished by force or by putting the victim in fear. The fear or intimidation is the gist of the offense.

Counsel submits that in view of the uncontradicted evidence that Epstein died immediately from the shot, he could not thereafter have been put in fear or had possession of property. Moreover, the record is devoid of evidence that the culprit applied force to Epstein after his death.

C. The trial judge in charging the jury on malice read to the jury, inter alia, the following passage:

> In determining whether a wrongful act is done with malice, you may infer that a person ordinarily intends the natural and probable consequences of acts knowingly done or knowing omitted.

The trial judge thus in effect instructed the jury that a wrongful act intentionally done is done with malice. Thirteen months before the trial, this Court in Green v. United States, 132 U.S.App.D.C. 100, 405 F.2d 1368 (1968) condemned substantially the same instruction. The Court observed (a) that a wrongful act intentionally done is not absolutely done with malice and (b) that the definition in the above-quoted passage omitted the element of wilfulness and lack of justification or excuse. The same question was involved in United States v. Wharton, (No. 22,433, decided by this Court on January 5, 1970), and the Court approved and reinforced the rationale in Green.

Counsel submits that the three jury instructions discussed above contravened teachings of this Court in several cases. The trial judge therefore committed plain error with the result that the verdicts and penalties exceeded both in quality and quantity what otherwise could and might have been the decisions of the jury.

VIII. THE ENTRY OF ERRONEOUS JUDGMENTS OF CONVICTION AND IMPOSITION OF CONCURRENT SENTENCES ON SOME CONVICTIONS VIOLATED APPELLANT'S RIGHT OF DUE PROCESS OF LAW.

Butler was convicted of felony-murder, second-degree murder and two counts of armed robbery of Epstein and Robinowitz, respectively, and assault with a dangerous weapon on Robinowitz. The judge imposed concurrent sentences of life imprisonment on the felony-murder conviction, eight to twenty-four years on each of the armed robbery counts and three to ten years on the assault with a dangerous weapon. The judge let the second-degree murder conviction stand but refrained from a sentence on this offense.

If Appellant is right in his contentions (a) that for killing Epstein he was guilty of either felony-murder or second-degree murder but not both and (b) that he could not have robbed a dead man, then (a) the conviction, even without the imposition of sentence, cannot stand in full force and effect simultaneously with that of felony-murder and (b) the concurrent sentence on the robbery of Epstein may result in substantial harm to him in terms of serious effects flowing from invalid convictions and concurrent sentences. Collateral effects may follow, such as probation or parole privileges, civil rights under state laws, effect for future impeachment purposes, and in direct effects such as those of such convictions based on the thinking and reaction of another judge with respect to sentencing on other counts or offenses.

In Benton v. Maryland, 393 U.S. 994 (1968), the Court heard oral arguments and then restored the case for reargument on a matter not specified in the original writ:

> Does the "concurrent sentence doctrine" enunciated in Hirabayashi v. United States, 320 U.S. 81, and subsequent cases, have continued validity in the light of such decisions as Ginsburg v. New York, 390 U.S. 629, 633, no. 2, Peyton v. Rowe, 391 U.S. 54, Carafas v. La Vallee, 391 U.S. 234, 237-238, and Sibron v. New York, 392 U.S. 40, 50-58.

In its subsequent opinion, 395 U.S. 784 (1969), the Court refused to apply that doctrine and cautioned against its use. The Court at pages 787-791 said that the concurrent sentence doctrine enunciated in Hirabayashi at page 105 of the report did not constitute a jurisdictional bar to the Court's deciding the petitioner's challenge to his larceny conviction. The Court reasoned that the possibilities of adverse collateral effects from that conviction gave the case an adversary cast and made it justiciable.

A fortiori, invalid convictions of second-degree murder and armed robbery could have at least as harmful collateral effects as a conviction of larceny. As a minimum, this Court must reverse in order to purge these invalid convictions in Butler's record.

SUMMARY

Appellant submits that the various errors committed in the trial of his case require a reversal of his various convictions. It is reasonable to argue that if defense counsel had known the essential details of Colbert's impermissibly suggestive pretrial identifications, they could have cast a substantial doubt in the minds of the jurors as to Colbert's in-court identification. Moreover, counsel can also tenably contend on this

appeal that if the trial judge had charged the jury that it should not deliberate on second-degree murder unless and until it determined that it could not convict on felony-murder, then we can only guess what the jury would have done. Counsel can plausibly assert that the jury, if convinced of guilt, might have returned a verdict of second-degree rather than of felony-murder but, in any event, not both.

CONCLUSION

For the reasons stated in this brief, Appellant Butler requests this Court to reverse the convictions. Depending on the bases for reversal, the District Court should be instructed to order any one or more of the following courses of action: (a) a new trial, or (b) an expurgation from the record the convictions for second-degree murder and armed robbery of Leon Epstein, or (c) a hearing to determine whether Colbert's in-court identification was of independent origin free from taint by pretrial identifications.

Respectfully submitted,

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,050

UNITED STATES OF AMERICA, APPELLEE

v.

GREGORY L. BUTLER, APPELLANT

Appeal from the United States District Court
for the District of Columbia

THOMAS A. FLANNERY,
United States Attorney.

JOHN A. TERRY,
JOHN R. DUGAN,
Assistant United States Attorneys.

Cr. No. 601-69

INDEX

TABLE OF CASES

OTHER REFERENCES

* Cases chiefly relied on are marked by asterisks.

ISSUES PRESENTED*

In the opinion of appellee, the following issues are presented:

I. Whether an independent source existed for the in-court identification of appellant by the witness Allen Colbert?

II. (a) Whether it was proper for the trial judge to permit the jury to consider, and to return guilty verdicts on, both the felony murder and second-degree murder counts of the indictment?

(b) Whether the trial judge was correct in instructing the jury that it made no difference whether or not the decedent was still alive when the money was taken from his person?

(c) Whether the trial judge correctly instructed the jury on malice?

* This case has not previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In an eight-count indictment filed April 28, 1969, appellant was charged with first-degree felony murder (killing while perpetrating and attempting to perpetrate the crime of robbery), in violation of 22 D.C. Code § 2401; second-degree murder, in violation of 22 D.C. Code § 2403; two separate counts of armed robbery, in violation of 22 D.C. Code §§ 2901 and 3202; two separate counts of robbery, in violation of 22 D.C. Code § 2901; one count of assault with a dangerous weapon, in violation of 22 D.C. Code § 502; and one count of carrying a dangerous weapon, in violation of 22 D.C. Code § 3204. The charges

arose in connection with events which occurred on February 3, 1969. After a trial by jury before the Honorable John H. Pratt on December 2 and 3, 1969, appellant was found guilty of first-degree murder, with a recommendation by the jury for life imprisonment, and guilty of second-degree murder, two counts of armed robbery and one count of assault with a dangerous weapon.[1] On February 16, 1970, appellant was sentenced to imprisonment for life for first-degree murder, eight to twenty-four years for each count of armed robbery, and three to ten years for assault with a dangerous weapon. All the sentences were ordered to run concurrently with each other. No sentence was imposed on the guilty verdict of second-degree murder.[2] This appeal followed.

The Government's Case

The factual background of the killing, robbery and assault charges was first described by Joseph Robinowitz, a co-employee with the deceased, Leon Epstein. Robinowitz, age 72, testified that on February 3, 1969, he and Epstein arrived at approximately 7:00 a.m. at their place of employment, the Rosenblatt Clothing Company, a men's clothing store at 641 D Street, Northwest (Tr. 8-9, 42).[3]

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[1] The Government made, and the court granted, a motion to dismiss count eight of the indictment, which charged appellant with carrying a dangerous weapon. The prosecutor had misplaced a copy of a certificate showing that appellant did not have a license to carry a weapon on the day in question (Tr. 156-157, 188). No verdict was returned by the jury on the counts charging robbery in view of their findings on the charge of armed robbery.

[2] See our argument in part II, *infra*, p. 15, wherein we discuss the implications of this ruling by the trial court.

[3] References to the transcript of these proceedings will be made according to the following system: "Tr." for the transcripts covering pages 1 to 112 (130) held on December 2, 1969, and pages 131 to 193 held on December 3, 1969; "Tr. I" for the supplemental transcript for December 2, covering voir dire, selection of the jury and the opening statement by the Government; "Tr. II" for the supplemental transcript for December 3, covering the closing arguments and instructions of the court.

According to their customary procedure, the two men would open the store at 7:00 a.m. They could not open the doors to the store any sooner because the store was protected by an alarm system (Tr. 8-9, 35). Robinowitz opened the front door to the store by unlocking the several locks; once the door was partially opened, Leon Epstein entered the building for the purpose of turning on the lights (Tr. 10-11, 24-25). On the day in question, as Robinowitz was completing the job of opening the front door, "two young men" grabbed his coat, pushed him inside the store and ordered that the door be locked (Tr. 11, 25). Both men were armed (Tr. 11, 25-27). As soon as the door was closed, one of the men fired a single shot at Epstein, hitting him in the head (Tr. 11, 20, 28-30). Robinowitz did not see Epstein move again, and to him Epstein appeared to be dead (Tr. 28, 36). His body was subsequently moved by the men to avoid its being noticed by passersby outside the store (Tr. 12, 32, 36).

Following the shooting, the men took a set of keys from Robinowitz and asked him for the combination to the safe (Tr. 12, 35-36). Robinowitz did not know the combination, and after so informing them, he was beaten about the face (Tr. 12, 37).[4] The two men dragged Robinowitz to the rear of the store and searched him for money, and he gave them $4.00 from his wallet (Tr. 13, 38-39). The wallet was not taken by the men but was discarded in the store, and Robinowitz was ordered to lie down in the rear of the store (Tr. 13, 39).

The men indicated a desire to leave the store shortly after these events. There was no back door, but Robinowitz suggested a possible escape route through a boarded-up hole inside the men's room at the rear of the store (Tr. 13, 40). Upon checking they decided against exiting in that fashion, but they did tear down some of the wiring to the burglar alarm system which was located near the men's room (Tr. 14). Robinowitz next suggested,

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[4] The store's telephone rang at this point, but no one answered it (Tr. 39-40).

since he did not have the required key to unlock the front door, that they check Epstein's body for the special key needed to leave the store (Tr. 14). Robinowitz was still lying on the floor, but he heard one of the men say, "Your buddy [Epstein] had a gun" (Tr. 15, 41).[5] Robinowitz next heard the door slam and saw that the men were gone (Tr. 14). He checked the front door to see if they were in sight; once assured they had gone, he summoned the police (Tr. 15).

Robinowitz testified that the men were in the store for approximately fifteen to twenty minutes (Tr. 41). He could not identify appellant as one of the men because he was nervous and afraid to look at them at the time of the offense (Tr. 41-42), but he described them generally: one man was about 5'7" tall, with a small build, and the other was 5'9" tall (Tr. 19). Robinowitz further stated that after the men left the store he checked the merchandise and noticed that one of the three-quarter length black leather coats was missing. He had observed the shorter of the two men with a similar type of coat in his possession (Tr. 16-19, 22). At trial Robinowitz identified an exhibit as a coat similar to the one he described (Tr. 22). Robinowitz testified that Epstein normally carried money with him to the store, but he was unable to state how much; he did not see the men take $100 from Epstein's body (Tr. 19, 41).

The first Metropolitan Police officer on the scene was Allen E. Richards. He arrived at the store a little after 7:00 a.m. and found Robinowitz at the front door to the clothing store. Once inside, he observed blood stains and a trail of blood leading to the body of Epstein in the rear of the store. He summoned an ambulance for Epstein (Tr. 44-47).[6]

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[5] Robinowitz confirmed this fact by reference to the decedent's practice of carrying a pistol to and from work, but he added that Epstein never carried it inside the store (Tr. 15).

[6] Following the officer's testimony the Government called Allen Colbert to the stand, but prior to any testimony before the jury, appellant requested a hearing on the issue of suggestiveness in

The evidence before the jury continued with a stipulation to the effect that Joel Klein, a relative of the deceased, identified Epstein's body to the Deputy Coroner, Dr. Linwood Rayford (Tr. 72). Dr. Rayford testified as an expert that Epstein's death was caused by a gunshot wound to the head (Tr. 73-76).

Allen Colbert testified that on February 3, 1969, he worked in Silver Spring, Maryland, and that in the course of his travels to work on that particular day he caught a bus at 7th and E Streets, Northwest, wherein he encountered appellant.[7] Colbert was unsure of the time that he caught this bus, but from what he said it would appear that it was a short time after 7:00 a.m. (Tr. 77-78, 93). Colbert's attention was drawn to appellant, who was already on the bus and seated in the last seat in the rear, because Colbert sat in the same seat on the opposite side from appellant and because appellant "was hunched down on the back seat as if he didn't want to be seen on the bus" (Tr. 79). Appellant's feet were on the ground, but his upper body was lying on the seat (Tr. 84-85). There was approximately five people on the bus, including the driver, at the time Colbert boarded it (Tr. 85). Colbert made an in-court identification of appellant as the man he saw on the bus on February 3, but he noted that at the time of trial appellant's hair appeared to be longer (Tr. 79-80).

As Colbert continued to observe appellant, another individual entered the bus at 7th and H Streets, Northwest, and sat down in the seat immediately in front of appellant (Tr. 80, 85-87). They appeared to know each other and began a conversation about appellant's story that he

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the showing of certain pictures to Colbert prior to the latter's viewing of appellant at a lineup (Tr. 47-72). This hearing will be treated in a separate section of our brief, *infra*, pp. 8-12.

[7] Colbert lived at 113 P Street, Southwest, on February 3, 1969. He testified that on the day in question he caught one bus near his residence in Southwest and that he had to transfer to a second bus at 7th and E Streets, Northwest, in order to complete his journey to Silver Spring (Tr. 77-78).

broke into Rosenblatt's clothing store that very morning (Tr. 80-81). The two did not really begin their conversation until after the bus passed 7th and K Street, at which time appellant sat up. Appellant had said "he wanted to get out of this part of downtown" (Tr. 86). Appellant explained to his friend on the bus that he and two other fellows had entered the store and that they had some trouble with the alarm system (Tr. 80-81, 87). Appellant had told one of his friends who went into the store "not to use the gun" (Tr. 81). There was some discussion between appellant and the other passenger that no money was taken (Tr. 81) but that he got a black leather coat from the store (Tr. 81, 87). Colbert identified a coat that the Government introduced into evidence as similar to the one he saw appellant carrying when he left the bus (Tr. 83). Appellant got off the bus at Georgia Avenue and Lamont Streets, Northwest, but Colbert had earlier heard appellant telling his friend that he planned to visit his aunt's house on Market Street [*sic*] (Tr. 82-83). Appellant was in Colbert's presence for approximately twenty-five to thirty minutes (Tr. 82).[3]

Appellant's cousin, Denise V. Williams, age 17, testified that on February 3, 1969, she lived at 618 Morton Street, Northwest, with her mother and other relatives (Tr. 96-97, 104). At approximately 7:30 a.m. Miss Williams was in her bedroom when she heard appellant knock at the door. Later she heard him make certain statements regarding a shooting and holdup of a store (Tr. 98-99). Miss Williams overheard his repeated admissions regarding the offenses and specifically recalled hearing him say he had two guns. She also saw the coat that appellant said he had taken from the store (Tr. 100-101).

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[3] On cross-examination Colbert explained that he did not contact the police until February 13. He stated, however, that he spoke to a friend at his place of employment regarding the incident. That friend had heard a radio account of the robbery and killing, and he advised Colbert that Colbert ought to report his information to the police or else he would notify them. Colbert was aware that there was a $10,000 reward for helpful information (Tr. 88-89).

Appellant told Miss Williams that he obtained $4.00 from one of the men in the store and that he came to their house by bus (Tr. 100). Appellant stayed in the house for about an hour and then left by cab (Tr. 107).

Mrs. Shirley Ross Williams, appellant's aunt and the mother of Denise Williams, testified that on February 3, 1969, appellant knocked on her door, and she let him in after he identified himself (Tr. 141-142). When asked why he was there so early, appellant said he "just shot somebody . . . . I just shot a white mother . . . fucker" (Tr. 143-144). Appellant explained the details. Over the previous weekend, he recounted, he and three other persons planned to rob Rosenblatt's (one of the conspirators had been employed there before). They rode in a black Cadillac to the store and waited until the men opened the store at 7:00 a.m. Appellant followed them into the store with a gun on them and said this was a "stickup." When one of the men was ordered to go to the back of the store, he went for his pocket and appellant shot him, intending to hit him in the shoulder. The other man was tied up, and appellant took $4.00 from him and a lot of money off the man he shot. Appellant also disclosed that he carried away a coat from the store. Upon leaving he boarded a bus near Kann's Department Store and lay down in the rear seat of the bus because it passed by Rosenblatt's and there were police arriving on the scene. He rode this bus to a stop near his aunt's house (Tr. 143-144, 146, 149-151). Appellant also displayed two guns to Mrs. Williams and said that one of those guns was obtained in the store (Tr. 144). Mrs. Williams inquired of appellant as to his reason for committing the offense, and he explained that he was not earning enough money. She saw appellant count more than $100 in her presence (Tr. 145, 152-153). Mrs. Williams described appellant as "scared and bragging" as he repeated his statements over and over again (Tr. 147). Appellant left at about the same time as Mrs. Williams, at 8:15 a.m., and caught a cab (Tr. 147-148).

The last Government witness, Officer Robert Pratt of the Metropolitan Police, testified that he arrested appellant on February 5, 1969, and that at the time of his arrest appellant was wearing the black leather jacket which was introduced into evidence (Tr. 154-156).[9]

The Defense

Appellant was the sole defense witness. He testified that on February 2 he had spent the night at a friend's house at 204 11th Street, Southeast. The next morning he boarded a bus at 7th Street and Pennsylvania Avenue, Southeast, and rode it to 7th Street and Pennsylvania Avenue, Northwest (Tr. 165-166, 170). He transferred to another bus in an effort to reach his aunt's house at 618 Morton Street, Northwest. Appellant was looking for employment, and he thought that his stepfather, who lived at his aunt's house, would be able to assist him in finding a job.

Appellant denied that he made any statements, either on the bus in front of Colbert or at his aunt's home, which might implicate him in the shooting of Epstein (Tr. 166-167, 174-175). However, appellant did agree that on February 3 he wore the black leather jacket introduced in evidence which had been seized from him at the time of his arrest (Tr. 168). Appellant said he bought the coat on February 1, 1969, from a "fence man" at 12th and K or L Streets (Tr. 167-168). Appellant also testified that on February 3 he left his aunt's home in a taxicab (Tr. 167).

The Identification

During trial, appellant learned that Allen Colbert had made a pre-trial photographic identification of him some time before viewing him in a court-ordered lineup with counsel present[10] (Tr. 48). Colbert had not yet testified

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[9] The Government concluded its case with a stipulation regarding the ownership of the property taken during the robbery (Tr. 162-163).

[10] The record indicates that it was not the same counsel who represented appellant at trial (Tr. 49).

before the jury.[11] Out of their presence a hearing was conducted to determine whether the showing of the photographs to Colbert was impermissibly suggestive (Tr. 49).

Colbert testified that on February 3, 1969, he boarded a bus at 7th and E Streets, Northwest, and that at that time he observed appellant (Tr. 50-51). At trial, according to Colbert, appellant wore his hair longer than on February 3 (Tr. 51). Appellant was in Colbert's presence for about thirty minutes during the bus ride up to Georgia Avenue and Lamont Street, Northwest, where appellant alighted. Colbert sat next to appellant in the last seat of the bus. His attention was drawn to him because appellant "was hunched down in the seat as if he didn't want to be seen" (Tr. 52-53). Colbert saw appellant without any covering over his face. In addition, a third person came to the rear of the bus and had a conversation with appellant. During the discussion Colbert focused his attention on appellant because he was doing most of the talking (Tr. 54).

With respect to the photographic identification, Colbert testified that a "few days" after February 3 he was shown photographs by a detective at the Homicide Squad. He identified appellant out of "quite a few," a "whole lot" of pictures (Tr. 54-55). The pictures were of Negro males, nineteen and twenty years old. Colbert recalled that the detective asked him "if I could recognize the person that I saw on the bus" (Tr. 55). He had no difficulty in picking out appellant's picture (Tr. 55).

Later that evening Colbert attended a lineup at which he observed six Negro males, and he picked out appellant (Tr. 55-56). Prior to the selection, Colbert was asked by the detective if he "could recognize the person that [he] picked out in the picture as the person [he] had seen on the bus" (Tr. 56). Colbert did so.[12] Colbert later testi-

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[11] Colbert later gave before the jury a more complete summary of his encounter with appellant (Tr. 77-95).

[12] A photograph of the lineup held on February 13, 1969, was shown to the witness (Tr. 57) and has been made a part of the record on appeal.

fied during this same hearing that his in-court identification was "based on the fact that this is the person that I saw on the bus and I didn't forget his face when I went down to the Homicide Squad" (Tr. 70). Colbert was then asked if the reward posted in this case influenced his decision to identify anyone. Colbert did not answer the question directly; rather he explained that the reason he came to the police was because a friend of his warned him that if Colbert did not call the police, then the friend would tell the police himself that Colbert had some information (Tr. 70-71).

Detective James E. Greenwell [13] testified that he and his partner, Detective Raymond M. Pierson,[14] investigated the homicide and that it was Pierson who selected and showed the pictures to Colbert (Tr. 58-63). Pierson was not available to give testimony on December 2. At first it was believed that the pictures were not segregated and saved by the police. This statement later proved to be incorrect, however, since the pictures had in fact been in a police file which was not located until the following day. The pictures were then produced in court. It was also learned that another police officer, Detective Sergeant Wilson, had been the person who showed the pictures to Colbert (Tr. 138-140).[15]

Appellant's counsel maintained through the proceedings below that the Government should have produced the pic-

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[13] The witness' name is misspelled in the transcript as "Greenwald."

[14] Detective Pierson's name is occasionally misspelled in the transcript as "Pearson."

[15] This latter information was obtained through the testimony of Detective Pierson, who spoke with Wilson on the telephone. Pierson came to court the next day, December 3. After the trial Detective John C. Wilson stated in an affidavit that he looked at the pictures in Government Exhibit 6, which are part of the record on appeal. Wilson stated that some of the pictures, one through eight, were shown to Colbert (one of these pictures was of appellant), but Wilson was unable to remember if three of the other pictures were shown to Colbert. On January 19, 1970, the Government orally moved that the affidavit be made part of the record, and the District Judge granted the motion that same day.

tures. The court ruled against appellant when it was thought that the pictures were not saved (Tr. 65-71). The court found that there was no showing of impermissible suggestion in the photographic identification that would taint the lineup identification (Tr. 66). The court thus permitted the Government to introduce the lineup and the in-court identifications. In addition, the trial judge ruled that, in any event, Colbert's in-court identification was based on an independent source in light of the length of time of observation and the unusual circumstances under which Colbert observed appellant on the bus during a substantive portion of the bus ride (Tr. 66).[16]

Despite the court's ruling allowing the Government to introduce proof of the pre-trial lineup confrontation, however, the prosecutor relied solely on the in-court identification (Tr. 72).

The next morning the Government located the pictures, which were made a part of the record (Tr. 133-140). The Government offered the pictures in further support of the trial judge's prior ruling on the due process issue, and the prosecutor indicated that an effort would be made to locate Detective Wilson. The matter was left in that posture, but the prosecutor was not able to produce Wilson.

Following the completion of all the evidence, appellant moved for a mistrial based upon the failure of the Government to bring Detective Wilson to court "to identify the pictures, to show that there was no suggestion to the witness Colbert at the lineup" (Tr. 176). The court denied appellant's motion and stated:

> I was careful, I thought, to make the finding that while I would admit the lineup identification if the government wanted to present it, I found that the witness Colbert had an independent source for his identification, his courtroom identification of this individual, Butler; and according to the record as it then stood and particularly as it stands now, there

[16] The court also remarked at a later point during this hearing that appellant's conversation was "sufficiently dramatic that Mr. Colbert was not going to forget it for quite some time" (Tr. 67).

was nothing suggestive in the showing of the 10 or 11 pictures to Colbert.

Now, the government stated then that they would not use the picture identification as a part of Colbert's testimony; and they further added that they wouldn't use the lineup identification as part of Colbert's testimony.

So that, in view of that, I don't think there is any basis for a mistrial on the ground that Officer Wilson has not been produced to testify with respect to the showing. (Tr. 176.)

ARGUMENT

I. The only "identification" testimony elicited at trial from the witness Allen Colbert was an in-court identification of appellant which was based on an independent source.

(Tr. 50-54, 65-66, 71, 78-85, 166, 168).

Appellant presents a spate of arguments attacking the identification testimony of Allen Colbert, but he fails to recognize the significance of the fact that the only identification testimony brought before the jury was Colbert's in-court identification. Although the Government was permitted to introduce evidence of the pre-trial identification by Colbert, it elected not to do so. Thus the identification issue presented here is a narrow one. The trial judge ruled, *inter alia*, that there was an independent source for the in-court identification (Tr. 65-66, 76). Hence the only question before this Court is the correctness of the trial judge's ruling on that point. Regardless of the merits of appellant's arguments regarding the right to counsel at a pre-trial photographic identification[17] and re-

[17] In *United States* v. *Kirby*, 138 U.S. App. D.C. 340, 427 F.2d 610 (1970), this Court declined to hold that an accused had an absolute right to counsel at a pre-trial photographic identification. Implicit in *Kirby* is the affirmative proposition that there is no such right. *See also United States* v. *Hamilton*, 137 U.S. App. D.C. 89, 420 F.2d 1292 (1969), in which the briefs show that the photo-

gardless of his contention as to a due process violation at the photographic[18] and lineup[19] identifications, this

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graphic identification complained of took place after the arrest of the defendant.

In addition, we would point out that several other federal circuit courts have explicitly and unequivocally determined that counsel is not required at a photographic identification. *United States* v. *Bennett*, 409 F.2d 888 (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1970); *United States* v. *Collins*, 416 F.2d 696 (4th Cir. 1969); *United States* v. *Ballard*, 423 F.2d 127 (5th Cir. 1970); *United States* v. *Sartain*, 422 F.2d 387 (9th Cir. 1970); *Rech* v. *United States*, 410 F.2d 1131 (10th Cir. 1969). The law on this point in the Third Circuit is unsettled. *Compare United States* v. *Conway*, 415 F.2d 158 (3d Cir. 1969), with *United States* v. *Zeiler*, 427 F.2d 1305 (3d Cir. 1970). The two courts which have held that the *per se* rule of *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), applies to photographic identifications have done so in situations where the police were attempting to circumvent *Wade-Gilbert*. In both *United States* v. *Zeiler*, *supra*, and *Commonwealth* v. *Whiting*, 439 Pa. 205, 266 A.2d 738, *cert. denied*, 400 U.S. —— (1970), the police showed photographs to witnesses in an obvious attempt to prepare them for a subsequent lineup identification. We do not consider Nevada as having adopted the *per se* rule. *Compare Thompson* v. *State*, —— Nev. ——, 451 P.2d 704, *cert. denied*, 396 U.S. 893 (1969), *with Carmichael* v. *State*, —— Nev. ——, 467 P.2d 108 (1970); and see this Court's comment in *United States* v. *Kirby*, *supra*, 138 U.S. App. D.C. at 342-343, 427 F.2d at 612-613.

[18] Great reliance is placed upon appellate counsel's view of the photographs which were shown to the witness. His conclusion that the "photographs which on their faces and backs virtually told [the witness] whose photograph to select" (Appellant's Brief, p. 27) is based upon speculation that the witness examined the pictures as meticulously as appellate counsel has done. There is no suggestion in the record, however, that the witness attached any significance, or even noticed, the dates and crimes listed on the back of the photographs. *Cf. United States* v. *Robinson*, —— U.S. App. D.C. ——, 432 F.2d 1348 (1970).

[19] There is nothing *per se* wrong in efforts by the police to secure a photographic identification prior to a lineup. *United States* v. *Stevenson*, D.C. Cir. No. 23,922, decided December 2, 1970. We view the lineup (a picture of it has been made part of the record; *see Patton* v. *United States*, 131 U.S. App. D.C. 197, 403 F.2d 923 (1968)) as not being unduly suggestive despite the fact that appellant was viewed the same night and wearing the same clothes he wore in the picture. The witness stated that his identification was "based on the fact that this is the person that I saw on the bus and I didn't forget his face when I went down to the Homicide

Court need consider only the independent source question to resolve the identification issue presented by appellant.[20]

Since the trial court found an independent source for the courtroom identification, appellant must now shoulder a heavy burden in striving to overcome that finding. *United States* v. *(Clinton) Long*, 137 U.S. App. D.C. 275, 278, 422 F.2d 712, 715 (1970); *see (Anthony) Long* v. *United States*, 137 U.S. App. D.C. 311, 424 F.2d 799, (1969); *Clemons* v. *United States*, 133 U.S. App. D.C. 27, 34, 408 F.2d 1230, 1237 (1968) *(en banc)*, *cert. denied*, 394 U.S. 964 (1969). Unless the trial judge's decision lacks substantial support in the record, it must not be disturbed. *United States* v. *Kemper*, *supra* note 20, —— U.S. App. D.C. at ——, 433 F.2d at 1155; *cf. United States* v. *McNeil*, —— U.S. App. D.C. ——, 433 F.2d 1109 (1969). The record in the case at bar overwhelmingly supports the trial court's conclusion of independent source.

Allen Colbert testified both in the presence and out of the presence of the jury that he boarded a bus early in the morning of February 3, 1969; that he went to the rear seat of the bus, which was not at all crowded (five persons were on it, Tr. 85); that he sat in the same seat as appellant; and that he paid particular attention to him because he was hunched over (Tr. 50-54, 79-80). Moreover, Colbert again focused his attention on appellant during the thirty minutes he was in the latter's presence because of a conversation appellant had with another passenger (Tr. 53-54, 80-82). Colbert was able to recall in great detail the substance of that conversation, which dealt with the breaking into Rosenblatt's store early that same morning and the carrying away of a coat. Moreover, Colbert learned that appellant intended to visit his

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Squad" (Tr. 70). The trial judge correctly ruled that neither the photographic identification nor the lineup identification was suggestive (Tr. 65-71, 176).

[20] *United States* v. *Sera-Leyva*, —— U.S. App. D.C. ——, —— n.1, 433 F.2d 534, 535 n.1 (1970); *United States* v. *Kemper*, —— U.S. App. D.C. ——, —— n.16, 433 F.2d 1153, 1155 n.16 (1970).

aunt when he alighted from the bus (Tr. 82-83). If there was any doubt as to the reliability of Colbert's identification testimony, it was corroborated in large part by appellant's own statement that he rode in a bus up to his aunt's house wearing the same coat that was introduced into evidence (Tr. 166, 168).

These are but a few of the many factors which would support the finding of an independent basis for the in-court identification. All this, we submit, amounted to "clear and convincing evidence" that the in-court identification was based not on a pre-trial viewing of appellant but rather upon observation of appellant shortly after the offense. *United States* v. *Sera-Leyva, supra; United States* v. *Kemper, supra* note 20; *see United States* v. *Wade, supra* note 17.

II. The court properly instructed the jury.

(Tr. 159-161, 176-178, 187; Tr. II 42, 48-49).

A. The trial judge correctly allowed the jury to consider, and render a verdict on, both the felony murder and second-degree murder counts.

Appellant was indicted for, and found guilty by a jury of, felony murder and second-degree murder. However, at the time of sentencing, the District Court did not impose a sentence on the latter verdict. Consequently, there exists no judgment to be set aside or vacated. We respectfully submit that the trial judge's action is consistent with *Fuller* v. *United States*, 132 U.S. App. D.C. 264, 286, 298 n.52, 407 F.2d 1199, 1221, 1233 n.52 (1968) *(en banc), cert. denied*, 393 U.S. 1120 (1969). *See also United States* v. *Hooper*, —— U.S. App. D.C. ——, —— n.8, 432 F.2d 604, 606 n.8 (1970), where this Court stated:

> The vacation of the judgment does not destroy the jury verdict, but is rather equivalent in practical effect to a suspension of the imposition of sentence. If it later develops that the interest of justice so requires, the sentence can be re-imposed on a concurrent basis. The conviction could then be subject to appellate review.

B. *The trial judge correctly charged that a dead person can be robbed.*

In *Carey* v. *United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961), this Court held that regardless of whether the victim of a murder and robbery was dead or not, he was still a "person" as that term is understood in the robbery statute in this jurisdiction. The trial judge correctly stated the law as interpreted by this Court.[21] Appellant's contentions on this point have been disposed of in *Carey*.

C. *The charge on malice was correct.*

Appellant contends the trial judge's instruction on malice "*in effect* instructed the jury that a wrongful act intentionally done is done with malice" (Appellant's Brief, p. 38) (emphasis added). On the contrary, this is precisely what the judge did *not* do. The instruction omitted the phrase which was found to be an incorrect statement of the law in *Green* v. *United States*, 132 U.S. App. D.C. 98, 405 F.2d 1368 (1968).[22] Moreover, the trial judge in-

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[21] The trial court instructed as follows:

> Now in connection with counts three and four, we are referring, of course, to Leon Epstein. Leon Epstein may or may not have been dead.
>
> The point I want to emphasize is that you can have a robbery from a dead man, and whether Mr. Epstein was alive or dead is unimportant. If you find the Government has proved beyond a reasonable doubt all the other elements of the offense, the fact that Mr. Epstein may have been dead need not deter you from finding that the Government has proved its case of armed robbery or robbery, as the case may be. (Tr. II, 48-49).

This issue was discussed at various places in the trial (Tr. 159-161, 176-178, 187), and the trial judge referred to *Frady* v. *United States*, 121 U.S. App. D.C. 78, 100, 348 F.2d 84, 106 (*en banc*), *cert. denied*, 382 U.S. 909 (1965), which also cited *Carey* for the same proposition of law.

[22] The sentence used by the trial judge was taken verbatim from JUNIOR BAR SECTION OF D.C. BAR ASS'N, CRIMINAL JURY INSTRUCTIONS FOR DISTRICT OF COLUMBIA, No. 83 (1966).

cluded the words "knowingly done or knowing omitted" (Tr. 4, Tr. II, 42) which this Court recently approved in a similar instruction on intent. *United States* v. *Moore*, D.C. Cir. No. 23,483, decided October 19, 1970, slip op. at 5-6. The instruction as given is unassailable on this point.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,050

UNITED STATES OF AMERICA, APPELLEE

V.

GREGORY L. BUTLER, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,050

UNITED STATES OF AMERICA, APPELLANT

v.

GREGORY L. BUTLER, APPELLANT

REPLY BRIEF FOR APPELLANT

On page 8 of its brief appellee asserts that at the lineup identification appellant was represented by counsel. Appellant disputes this statement. The record does not show the presence of counsel. The only thing in the record on this point is defense counsel's statement:

> I am not saying anything about the lineup itself because I understand he was represented by counsel at that time.'''We don't know whether counsel at that time knew of these pictures. (TR. 49)

Defense counsel's statement was not proof of an attorney's presence at the lineup. Under the circumstances the statement of "understanding" was not a waiver of a constitutional right nor an admission of the unproved alleged representation. In this situation the burden of proving the absence of counsel at the lineup was not on appellant. In United States v. Garner, No. 23,368 -- U.S. App. D.C._____, decided

November 6, 1970, there was no affirmative testimony that a defense attorney was present at the lineup identification in question. The Court concluded that the Government was best able to produce evidence that counsel was present at the lineup and therefore had the burden of proving it. The defendant, said the Court, should not have to prove a negative. (Slip opinion page 3) The decision in Garner applies to appellant's case since there was no testimony that a defense counsel was present at the lineup identification. In Chapman v. California, 386 U.S. 18, 24 (1967) the Court said that certainly

> Constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.

Appellant's counsel admits that the trial judge found that Colbert's identification had an independent source. The record, however does not disclose (a) whether the judge ever saw the pre-lineup and the lineup photographs, respectively, and (b) what were all the circumstances of these pretrial identifications.

Appellee's discussion on pages 12 and 13 of its brief is somewhat misleading in relation to the question of an accused's absolute right to counsel at a pretrial photographic identification. Kirby implies such a right for one who is not present but has been arrested for or charged with the crime and is in custody. Kirby referred to the Nevada

case of Thompson v. State, cited in footnote 17 of appellee's brief on page 13, for the view there expressed of need for counsel at a photographic identification, unless and until the photographs shown to the identifying witness are preserved and available at trial in order to rebut a claim of suggestiveness.

On November 16, 1970 in No. 586 the Supreme Court denied certiorari to review Pennsylvania v. Whiting, 439 Pa. 205, 266 A. 2d 738 (7/2/70). In this case the Pennsylvania Court adopted the per se rule of right to counsel at photographic identifications. The Court cited with approval the following language from United States v. Zeiler, 427 F. 2d 1305, 1307 (3 Cit. 6/5/70):

> The considerations that led the Court in Wade to guarantee the right of counsel at lineups apply equally to photographic identifications conducted by police after the defendant is in custody. ... The dangers of suggestion inherently in a corporeal lineup identification are certainly as prevalent in a photographic identification. ... Also the defendant, himself not being present at such a photographic identification, is even less able to reconstruct at trial what took place unless counsel was present. ... In addition, the constitutional safeguards that Wade guaranteed for lineups may be completely nullified if the police are able privately to confront witnesses prior to the lineup with suggestive photographs.

Appellant's counsel submits that in view of the Supreme Court's denial of certiorari in Whiting it approved sub silentio the doctrine there expounded and applied.

In the case of the instant appeal the fact of the photographic identification became known to the prosecutor and defense counsel only after the trial had begun. The photographs were unavailable during the testimony of the identifying witness. Accordingly defense counsel was severely handicapped in his cross-examination. The net result as to this aspect of the trial was a denial of effective assistance of counsel guaranteed by the Sixth Amendment, not due to appellant or his counsel. In Powell v. United States, 287 U.S. 45, 69 (1932) the Court said that in a criminal case the defendant "requires the guiding hand of counsel at every step in the proceeding against him" and in Avery v. Alabama, 308 U.S. 444, 447 (1940) the Court said that "where denial of the constitutional right to assistance of counsel is asserted, its peculiar sacredness demands that we scrupulously review the record."

On page 15 of its brief the Government mentions but does not answer appellant's argument based on Fuller and Fullard as well as Benton. The second degree conviction of appellant has continuing force both in terms of possible prospective imposition of sentence as well as certain collateral effects. See Hooper, which appellee quotes on page 15 of its brief. A new trial is required because, inter alia, of the erroneous instructions involving the Fuller and Benton aspects of this appeal.

Appellee's reliance on Carey and Frady is misdirected in relation to the issue whether a dead person can be robbed. A scrutiny of Carey shows that the opinion is ambiguous and self-contradictory on the question

involved here. The opinion, however, clearly states that an interval of time occurred between the stabbing and the death during which defendant removed the victim's wallet. In the instant appeal, the record shows that the victim was dead when the money was taken from his body. The majority opinions in Frady do not support appellee. However, Judge Miller, speaking for himself and the other three dissenting judges, said in footnote 14:

> The trial judge's charge correctly made it clear, however, that the count charging murder during the perpetration of robbery could not be sustained unless Bennett was alive when his wallet was taken.

CONCLUSION

For the reasons stated in this reply brief and in appellant's main brief appellant's counsel submits that this Court should reverse the judgment of the District Court,

Respectfully submitted,

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APPELLANT'S PETITION FOR REHEARING AND/OR SUGGESTION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,050

GREGORY L. BUTLER,

Appellant

v.

UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Appellant, by Milton A. Kallis, his court-appointed counsel, petitions for a rehearing and/or suggests a rehearing en banc for the reasons stated below.

Counsel's rationale in relation to the Fuller problem rests on the postulate that a conviction of first-degree murder causes the defendant more substantial disadvantages than does a conviction of second-degree murder. Some details of this difference are stated in appellant's main brief. Another postulate is that it is the sole function of the jury to decide the degree of guilt in a homicide case, according to its finding of facts.

In its opinion of November 17, 1971, the court appears to have overlooked or misapprehended the problem stemming from the trial court's erroneous application of the Fuller doctrine. The opinion creates a doubt whether in this type of situation it is the true function of an appellate court to try to probe the minds of the jurors to speculate whether they would have returned a verdict of second-degree, rather than a first-degree guilt, if they had a choice of only one. The opinion is silent as to the criteria of "substantial prejudice" mentioned but not discussed on page 4 of the opinion. There is thus an ambiguity of inference as to the procedural effects of the Butler kind of dilemma. Accordingly, the court should rehear this aspect of the appeal and decide whether the Fuller doctrine, in the light of the Constitutional right to trial by jury, requires a new trial or other relief which may be meet.

In footnote 3 on page 4 of its opinion of November 17, 1971, the court erroneously states that "the District Court entered no judgment on the second-degree murder count." In its written "judgment and commitment" filed February 17, 1970, the District Court said inter alia, "no sufficient cause" had been shown "why judgment should not be pronounced" on the charge of second-degree murder. The court accordingly

expressly adjudged Butler guilty as charged and convicted. Counsel therefore concludes that the trial judge did enter a judgment on the second-degree murder count. Since it is a nullity in view of this court's statement in footnote 3 on page 4 of this court's opinion, counsel requests that the court expressly rule that the judgment is void and should be expunged. By this means the mandate will direct the District Court to vacate what appears to be an outstanding but unenforceable judgment.

Respectfully submitted,

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